

THIS MATTER is before the Court on Defendant Justice Harrison Campbell's "Motion to Dismiss" pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. No. 5). Defendant seeks dismissal of the Complaint in its entirety. In the Complaint, Plaintiff R. Keith Johnson, as trustee of the Chapter 7 bankruptcy estate of Marolyn Teresa Collins, seeks to set aside the transfer and recover the money from Defendant pursuant to sections 548 and 550 of Title 11 of the United States Code. Complaint, Johnson v. Campbell, Adv. Proc. No. 17-03-66, (Bankr. W.D.N.C. June 22, 2017), ECF No. 1. Defendant answered the Complaint and within the Answer listed its defenses under Rule 12(b) of the Federal Rules of Civil Procedure. Answer, Johnson v. Campbell, Adv. Proc. No. 17-03-66, (Bankr. W.D.N.C. July 24, 2017), ECF No. 2. Although Defendant listed these defenses under the subheading motions, including a defense of failure to state a claim upon which relief may be granted, Defendant did not file a motion or state with particularity the facts supporting a motion under Rule 12 as required by the Local Rule 7007-1(a) of the United States Bankruptcy Court for the Western District of North Carolina. Defendant did not move for summary judgment or file a response to Plaintiff's motion for summary judgment. After summary judgment in favor of Plaintiff and against the Defendant for the relief requested

was granted by the Bankruptcy Judge as to all issues, except the issue of insolvency of the Debtor at the time of transfer in March 2016, this Court withdrew reference of the case to the Bankruptcy Judge. (Doc. Nos. 1, 2). The Court scheduled a final pretrial conference for April 30, 2018, notified that parties that this case will be tried with a jury to be held at the first available mixed term of court commencing in May, and notified the parties that docket call would occur on May 1, 2018. (Doc. Nos. 1, 4).

Defendant for the first time filed a motion to dismiss pursuant to Rule 12(b)(6) on April 24, 2018. Defendant argues that the Complaint fails to show or allege that the debtor, Marolyn Teresa Collins, was insolvent or made insolvent at the time of the transfer. (Doc. Nos. 5, 6).

As Defendant answered the Complaint, and the pleadings are closed, the Court cannot consider Defendant's motion under Rule 12(b)(6). Motions under Rule 12 of the Federal Rules of Civil Procedure "must be made before pleading" where a responsive pleading is allowed.

THEREFORE, the Court hereby DENIES Defendant's "Motion to Dismiss" pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Doc. No. 5) without prejudice to Defendant's assertion of his defense, see Fed. R. Civ. P. 12(h)(2).

IT FURTHER APPEARS that the parties have not filed their pretrial submissions as required by the Court's March 21, 2018 Order or moved for an extension of time. The Court hereby *sua sponte* EXTENDS the time for the parties to file their pretrial submissions to 5:00 pm on April 26, 2018. The Court, however, notifies the parties that the failure to timely submit the pretrial submissions may result in this Court ordering the parties to show cause.

The Clerk is respectfully directed to mail this Order to Defendant.

IT IS SO ORDERED.

Signed: April 24, 2018

A handwritten signature in black ink, appearing to read "Frank D. Whitney", written over a horizontal line.

Frank D. Whitney
Chief United States District Judge

